

**COURT OF COMMON PLEAS  
FOR THE STATE OF DELAWARE**

KENT COUNTY COURTHOUSE  
38 THE GREEN  
DOVER, DELAWARE 19901  
PHONE: (302) 735-3910

**CHARLES W. WELCH, III  
JUDGE**

April 5, 2016

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Greenville, DE 19807  
Attorney for Defendant

Mr. Ernest Fogleman  
1061 S. Little Creek Road  
Lot #61  
Dover, DE 19901  
*Pro se* Plaintiff

RE: Ernest Fogleman v. Dover East Estates and Karen Kemp  
C.A. No.: CPU5-15-001386

Defendant's Motion to Dismiss

Dear Mr. Morton and Mr. Fogleman:

The Court is in receipt of the Motion to Dismiss filed by the defendants, Dover East Estates and Karen Kemp, for the above-referenced matter. The motion was filed pursuant to Court of Common Pleas Civil Rules 12(b)(6) and 12(b)(7). After careful consideration by the Court, the defendants' motion is granted because the plaintiff failed to state a claim for which relief can be granted under the Federal Debt Collection Practices Act (hereinafter "FDCPA"), 15 U.S.C. § 1692 (2012).

This matter arises from a landlord-tenant relationship between the defendant, Dover East Estates, and the plaintiff. The plaintiff, along with his wife Judith Fogleman, were tenants of Dover East Estates, a manufacturing housing community, where they leased lot #61 located at 1061 S. Little Creek Road, Dover DE 19901 (hereinafter the "Rental Lot"). In 2015, the plaintiff defaulted on his rent. It is alleged by the plaintiff that Defendant Karen Kemp, the property manager for Dover East Estates, contacted the plaintiff's daughter without the plaintiff's consent and disclosed information regarding the plaintiff's rent in arrears.

Dover East Estates was awarded summary possession of the Rental Lot in the Justice of the Peace Court on or about October 15, 2015.

On or about November 11, 2015, the plaintiff filed this civil action against the defendants alleging that the defendants violated the FDCPA, § 1692c(b) when Ms. Kemp contacted the plaintiff's daughter regarding his rent in arrears, without the plaintiff's consent.<sup>1</sup> The plaintiff has requested damages in the amount of \$5,000.

In response, the defendants filed the instant motion on the grounds that: (1) the plaintiff failed to sufficiently allege necessary facts showing that he is entitled to relief; (2) the plaintiff failed to state a claim under the FDCPA because neither defendant is a "debt collector" under the Act; and (3) the plaintiff has failed to name his wife who is an indispensable party to this action pursuant to Court of Common Pleas Civil Rule 19(a).

### STANDARD OF REVIEW

"When deciding a motion to dismiss, the Court must examine the complaint and accept all well-pleaded allegations as true." *Morabito v. Del. Sleep Disorder Ctrs., LLC*, 2015 WL 3882609, at \*2 (Del. Super. June 23, 2015) (citations omitted). "If the facts alleged in the complaint are sufficient to support a claim for relief, the motion should be denied." *Id.* "The test for sufficiency is a broad one, that is, whether a plaintiff may recover under any reasonably conceivable set of circumstances susceptible of proof under the complaint." *Id.* "An allegation, though vague or lacking in detail, is nevertheless 'well-pleaded' if it puts the opposing party on notice of the claim being brought against it." *Id.*

### DISCUSSION

The defendants contend that they are not liable under section 1692c(b) of the FDCPA because neither is a "debt collector" as defined under the Act.

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<sup>1</sup> § 1692c(b) in part states:

#### **§ 1692c. Communication in connection with debt collection**

##### **(b) Communication with third parties**

Except as provided in section 1692b of this title, without the prior consent of the consumer given directly to the debt collector, or the express permission of a court of competent jurisdiction, or as reasonably necessary to effectuate a postjudgment judicial remedy, a debt collector may not communicate, in connection with the collection of any debt, with any person other than the consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector.

The purpose of the FDCPA is “to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.” 15 U.S.C. § 1692(e).

In determining whether the FDCPA governs the prohibited activity at issue, “the first determination must be whether the entity [or person] alleged to be engaged in the debt collection activity regularly collects debt or whether debt collection is the principal purpose of its business.” *Siwulec v. J.M. Adjustment Servs., LLC*, 465 F. App’x 200, 203 (3d Cir. 2012). In other words, the first determination is whether the defendant is a “debt collector” under the Act.

“Debt Collector” under the FDCPA is defined in pertinent part as

any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. . . . [T]he term includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts.

15 U.S.C. § 1692a(6)(A). The term does not include “any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor.” *Id.* A “Creditor” is defined in part as “any person . . . to whom a debt is owed but such term does not include any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another.” § 1692a(4).

In the instant case, the plaintiff does not assert in his Complaint, nor in his response to the defendant’s motion, that Defendant Dover East Estates attempted to collect the rent owed in another name other than its own. A reasonable inference can be drawn from the plaintiff’s allegations that the plaintiff acknowledges that Dover East Estates attempted to collect its own debt. Because creditors who collect their own debts while using their own names are not “debt collectors” under the FDCPA, Dover East Estates cannot be held liable under the Act. *Route 40 Holdings, Inc. v. Tony’s Pizza & Pasta, Inc.*, 2010 WL 2161819, at \*2 (Del. Super. May 27,

2010); *see also Jarzyna v. Home Properties, L.P.*, 114 F. Supp. 3d 243, 253 (E.D. Pa. 2015). Therefore, the plaintiff's claim is dismissed as to Dover East Estates and Defendant Dover East Estates' Motion to Dismiss is GRANTED.

Furthermore, Ms. Kemp was an employee of Dover East Estates at the time of her alleged actions. By virtue of § 1692a(6)(A), an employee of a creditor is not a "debt collector". Therefore, she cannot be held liable under the FDCPA. The plaintiff's claim against her must also be dismissed. Therefore, Defendant Karen Kemp's Motion to Dismiss is GRANTED.

The plaintiff's claims against the defendants are dismissed for failing to state a claim upon which relief can be granted under the FDCPA. It is not necessary for the Court to address the remaining arguments presented by the defendants.<sup>2</sup>

### CONCLUSION

In conclusion, the defendants are not "debt collectors" under the FDCPA. Therefore, the defendants do not fall within the ambit of the FDCPA. The defendants' Motion to Dismiss is hereby GRANTED.

**IT IS SO ORDERED this 5<sup>th</sup> day of April, 2016.**

Sincerely,



Charles W. Welch, III

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<sup>2</sup> The defendants 12(b)(7) motion for failure to name an indispensable party under Civil Rule 19(a) will not be addressed. The defendants also argued that the plaintiff's Complaint failed on its face to sufficiently allege necessary facts showing he is entitled to relief. Because pleadings by *pro se* litigants are held to a less stringent standard, the Court may grant a party leave to amend a deficient pleading when justice so requires. *Vick v. Haller*, 522 A.2d 865, 1987 WL 36716, at \*1 (Del. 1987) (TABLE); Ct. Com. Pl. Civ. R. 15(a). However, leave to amend, sua sponte or by motion, will not be granted where the amendment would be futile. *Clark v. State Farm Mut. Auto. Ins. Co.*, 2016 WL 125432, at \*4 (Del. Jan. 11, 2016). In light of the reasons granting the defendants' motion, leave to amend given by this Court would have been futile.